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### **The Transition Settlement Agreement and Release**

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At the conclusion of a successful transition negotiation, the entire understanding reached between a community association and Sponsor should be memorialized in a written settlement agreement. The Sponsor normally also will demand that the association execute a general release relinquishing all other claims that the association then possesses, or might ever possess, against the Sponsor. In most cases the association should reject the Sponsor's demand and agree to provide only a narrower, "specific" release. Accordingly, both the settlement agreement and release must be carefully drafted to clearly and comprehensively define the Sponsor's settlement obligations and to protect the association's interests.

As part of the transition settlement, the Sponsor may agree to remedy construction defects by performing repairs or replacing common elements. The settlement agreement should specify each type of construction defect that the Sponsor will remedy, each location in the complex where the defect will be remedied, and the precise method of remediation that the Sponsor will utilize. Preferably, the agreement should include a separate exhibit for each defect that the Sponsor will remedy, containing repair specifications that have been approved by the association's engineer. By incorporating these specifications into the agreement, the association can significantly reduce the possibility of a subsequent dispute with the Sponsor concerning whether the method of remediation was appropriate.

The association should not allow the repair of any suspected defects "to be determined" after "further investigation" by the Sponsor -- it is important that any such uncertainty be eliminated before reaching a final agreement with the Sponsor. Moreover, to assure that all remedial work is performed in accordance with the approved specifications, the agreement should allow the association to have its engineer or other representative present during the remedial work.

If the Sponsor agrees to pay funds to the association as part of the settlement, the agreement should specify all of the payment terms: the total amount to be paid, the due dates and amounts of any partial/installment payments (one lump sum payment being preferable), any conditions that might affect the payment, and the association's rights in the event of the Sponsor's default. To provide the Sponsor with a disincentive against breaching the agreement, the association's counsel may consider negotiating a liquidated damages clause or a requirement that the Sponsor pay all of the association's legal fees if the association prevails on a claim of breach of the agreement.

The agreement should state that it is not in any way waiving, releasing or otherwise effecting any claims or rights that any unit owner or other person may possess against the Sponsor, and that the agreement is intended to affect only the rights and remedies of the association as an entity. This provision will protect against an unscrupulous developer asserting that the association's release also released claims of individual unit owners.

There are various other provisions that are commonly in a contract that also should be included in the settlement agreement. For example, the settlement agreement should state that it constitutes the entire and integrated agreement between the association and the Sponsor, and supercedes all prior negotiations, representations or agreements, either written or oral. The agreement also should state that there can be no change of any kind to it, unless the change is made in a written instrument signed by both parties, and accompanied by a properly executed form of resolution of the association's Board. The agreement should expressly state that the association's managing agent has no authority to make any change to the agreement on behalf of the association, and that any change must be executed only by a duly authorized member of the association's Board. There are two reasons for this provision: it reduces the chance of a misunderstanding between the Board and the managing agent and, if the managing agent was originally hired by the Sponsor, it eliminates a potential conflict of interest.

As stated above, as part of a final transition settlement the Sponsor commonly will request a general release from the association of all claims of any kind, including unknown claims that might accrue in the future. In most cases, the association should reject the Sponsor's demand for a general release and instead provide a narrower, carefully tailored specific release. The release should expressly preserve the rights of the association, and its insurance carriers by way of subrogation, to prosecute certain kinds of claims against the Sponsor (and its contractors, subcontractors, principals, design professionals, other agents, servants and employees) that may arise long after the transition agreement is executed. In doing so, the release must strike a fair balance between the competing interests of the Sponsor and association. The Sponsor has a legitimate interest in protecting itself against the association making future claims for construction defects that were known to exist -- or could have been discovered through the exercise of reasonable diligence -- at the time the settlement agreement was executed. The association has an equally important interest in preserving its right to make claims against the Sponsor for construction defects that were not discoverable, through the exercise of reasonable diligence in performing visual non-invasive inspections, at the time of the settlement agreement. The association also must preserve its right to sue the Sponsor and other persons involved in construction of the complex in the event the association is sued by a unit owner or other person who alleges personal injury or property damage due to a defect in any aspect of the design or construction of the community. Accordingly, the association may wish to limit the scope of its release by including a provision similar to the following:

Nothing in this Specific Release will release the right of the Association, or otherwise bar the Association (or its insurance carrier(s) by way of subrogation)

from prosecuting any claims, cross-claims or third-party complaints against Sponsor (its contractors, subcontractors, principals, design professionals, other agents, servants and employees) if (a) the Association sustains or allegedly sustained or (b) a unit owner or other person or entity sues the Association alleging that said unit owner, person or entity sustained:

(i) personal injury (including but not limited to bodily injury, sickness, condition or death) and/or

(ii) property damage (including but not necessarily limited to loss of use, diminution in value, or partial or complete destruction of)

due to a deficiency or defect in any aspect of the construction, design, and/or building materials used in the construction, of any portion of the condominium complex (including but not limited to units, general and limited common elements) where that deficiency or defect was not reasonably discoverable by the Association, as of the date of execution of this Specific Release, through the exercise of reasonable diligence in:

a. performing visual non-invasive inspections of the condominium complex; or

b. investigating any deficiency or faulty condition that (i) was known to exist by the Association as of the date of this Specific Release and that (ii) was caused by or contributed to the claimed construction defect.

Once the association and Sponsor have tentatively agreed on the wording of the release, the association should obtain its insurance carrier's written approval of the release before executing it. Otherwise, the association might find itself in a future coverage dispute with its insurer. For example, if a unit owner sues the association, but not the Sponsor, for serious bodily injury or extensive property damage caused by a latent construction defect, the association very likely will file a third party complaint against the Sponsor. But if the association gave the Sponsor a general release at the time of the transition settlement, and the Sponsor successfully invokes the release to dismiss the association's claims, the association's insurance carrier might decline coverage on the ground that its ability to recover damages against the Sponsor has been prejudiced by the association's release. The association can avoid this consequence by obtaining its carrier's approval of the release before signing it.

Finally, the executed release should not be given to the Sponsor until the Sponsor has fully performed all terms of the settlement agreement.